Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
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No. 88-652

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES BEN HOWELL, PETITIONER

V.

STATE BAR OF TEXAS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Respectfully submitted,

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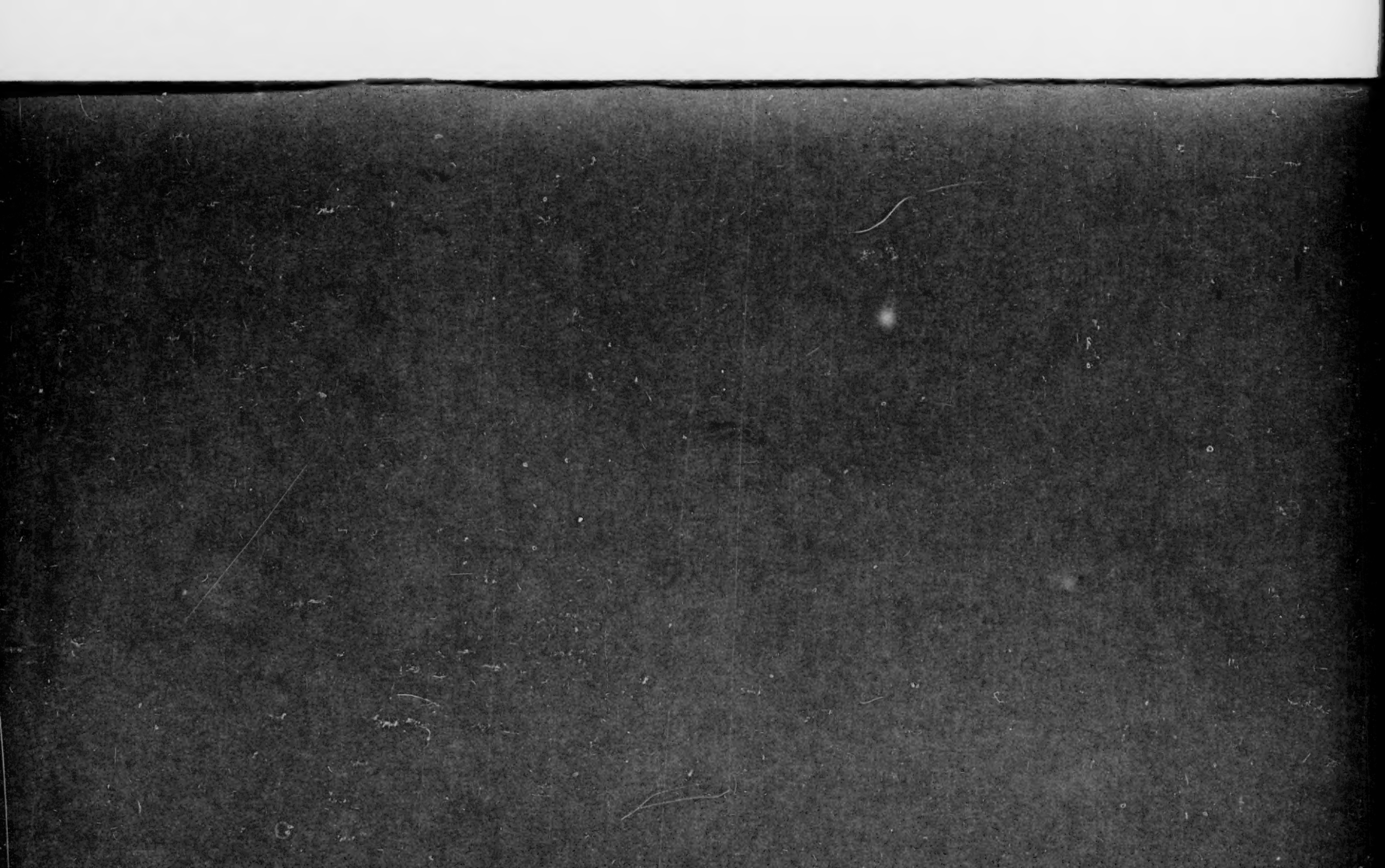

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QUESTION PRESENTED

As part of the Texas attorney disciplinary scheme is DR 1-102(A)(5) facially unconstitutional?

SUMMARY OF THE ARGUMENT

Disciplinary Rule 1-102(A)(5) as part of the Texas attorney disciplinary scheme is constitutional on its face. It is neither vague in terms of the Fourteenth Amendment nor overbroad in the context of the First Amendment. It gives fair and adequate notice to attorneys at who they are directed and does not create a "chilling effect" upon an attorney's freedom of speech or association. The rule establishes a standard of attorney conduct below which no attorney can fall.

ARGUMENT

DR 1-102(A)(5) provides as follows:

> (A) A lawyer shall not:
>
> . . .

> (5) engage in conduct that is prejudicial to the administration of justice.

Howell argues that DR 1-102(A)(5) as part of the Texas attorney disciplinary scheme is unconstitutionally vague. A law is determined to be facially vague only if its terms are so loose and vague that it is incapable of any valid application. Village of Hoffman Estates v. Flipside Hoffman, Inc., 455 U.S. 489 (1982). In other words, a law is determined to be facially vague if it fails to give the individual fair or adequate notice of what conduct is proscribed or has a "chilling effect" on an individual's First Amendment rights.

The statute under scrutiny is not a general vagrancy ordinance, breach of the peace ordinance, or subversion ordinance. This is not a situation where the general public at large is left

uncertain with respect to what activities are proscribed. This is a statute which is written in the context of lawyer discipline, a rule which is written specifically for lawyers, and a rule to which only lawyers are subject.

In Grayned v. City of Rockford, 408 U.S. 104 (1972), this Court noted that the applicable standard when considering an attack on the vagueness of the statute was not one in which abstract terms are given academic definitions. Instead, the practical criterion of fair notice is to look at those to whom the statute is directed. Thus, DR 1-102(A)(5) must be considered in light of legal and judicial system which should be intimately familiar to lawyers, including Mr. Howell, and in doing so do not render the terms "prejudicial" and "administration of justice" obscure. The Fifth Circuit

is correct in stating that "The particular context in which regulation is promulgated therefore is all important."

Grayned also recognized that the degree of vagueness that the Constitution tolerates depends in part on the nature of the enactment. In the case at hand, the focus is the nature of the Disciplinary Rules which are promulgated to establish a standard of conduct below which no lawyer can fall. Courts have inherent authority to discipline lawyers and this power is derived from the lawyers role as an officer of the court which granted its admission. The principle here is that lawyers are officers of the court who perform a fundamental role in the administration of justice and whose concern is that of damaging the integrity of the privilege.

The Supreme Court of Kansas in State v. Nelson, 504 P.2d 211 (1972) recognized that the word "prejudicial" is universally found throughout the legal and judicial system. And several of the cases cited by Howell in support of his position actually employ the phrase "administration of justice" without seeming to be mystified by its meaning. See Spevack v. Kline, 385 U.S. 511 (1967); In re Oliver, 470 F.2d 15 (7th Cir. 1972); Chicago Counsel of Lawyers v. Bauer, 522 F.2d 247 (7th Cir. 1975).

The court in In re Snyder, 472 U.S. 634 (1985) spoke to the phrase "conduct unbecoming a member of the bar." This court held that the phrase must be read in light of "the complex code of behavior" to which attorneys are subject to. Lawyers have a dual obligation not only to their client but also to the

system of justice. The license granting the privilege to practice law requires members of the bar to conduct themselves in a matter compatible with the role of the courts in the administration of justice.

The court in In re Ruffalo, 390 U.S. 544 (1968) also spoke to the phrase "unbecoming a member of the bar." The court stated "even when the disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct generally condemned by responsible men, will be grounds for disbarment." The State Bar would submit to this court that the phrase "prejudicial to the administration of justice" gives as adequate notice if not more as the phrase "conduct unbecoming a member of the bar" to lawyers as to acceptable and unacceptable conduct.

Howell argues that the statute is so vague that no valid application exists. It is interesting to note that Howell argues that the Texas courts do not restrict application to egregious situations, nor to isolated conduct. In doing so, Howell concedes that situations exist in which the rule could be applied yet merely contends that the rule should not have been applied to him. Howell is once again attempting to interject his "as applied" arguments. But the Fifth Circuit rightly refused to enter into the thicket of the attorney disciplinary system of the State of Texas as applied to Howell.

The Texas Court of Appeals defined "prejudicial" as 1) tending to injure or impair, 2) detrimental, and 3) harmful, hurtful, or injurious. It defined "administration of justice" as that

which consists of 1) the trial of cases in court, 2) their judicial determination and disposition by orderly procedure under rules of law, and 3) putting of the judgment into effect. (See Howell v. State, 559 S.W.2d 432 (Tex.Civ.App.--Tyler 1977, writ ref'd n.r.e.).

Applying this definition, DR 1-102(A)(5) is not so vague that it has a "chilling effect" on a lawyer's First Amendment rights. This statute is not aimed at the communication of ideas or information. It is not directed at an arena of public discussion. The focus of the rule is directed at a lawyer who commits some act or omission detrimental to the trial of cases, their judicial disposition or the putting of the court's judgment into effect.

Howell is critical of the Texas Court of Appeals use of dictionary terms in defining DR 1-102(A)(5). However, the use of dictionary terms to aid in statute

construction is used frequently by courts. See Ferguson v. Estelle, 718 F.2d 730 (5th Cir. 1983).

Finally, the court in Disciplinary Proceedings of Phelps, 632 F.2d 171 (10th Cir. 1981) has held:

> It is not necessary that the rules list each and every instance in which a lawyer may possibly violate these rules and it is unnecessary that there must have been a previous judicial construction of the rules in order for governing legal precepts to exist.

The opinion of the Fifth Circuit is clearly correct.

Howell also argues that DR 1-102(A)(5) is unconstitutional for overbreadth. In considering a challenge for unconstitutionality for overbreadth, the fear is that the law is so sweeping that it not only reaches activities which are unprotected by the First Amendment, but also constitutionally protected conduct.

Howell argues that 1-102(A)(5) could be used to discipline a lawyer for his life-style and thus violate his freedom of association. However, in using the Texas court's interpretation it is clear that they refer to only a lawyer's conduct in the trial of cases and their disposition and therefore Howell's argument is without merit.

Howell also argues that the statute is so vague as to have a "chilling effect" on a lawyer's zealous representation of a client. Yet a lawyer's duty to represent a client zealously has always been bridled by his duty to conduct himself within the bounds of the law. An attorney's right of free speech is not absolute and is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held. The right to free

speech must be viewed in conjunction with his duty not to obstruct justice. Zealous advocacy must be limited to actions which are within the bounds of the law. Nelson, supra.

In New York v. Ferber, 458 U.S. 634 (1985) this court held that the statute should not be invalidated for overbreadth unless it reaches substantial number of permissible activity. Howell has failed to show that there is a substantial amount of conduct prejudicial to the administration of justice which is constitutionally protected conduct.

One final question in examining the claim of unconstitutionality for over-breadth is whether the manner of the expression is incompatible with the normal activities of a particular place at a particular time. Grayned. Conduct that is detrimental to the trial of cases

in their judicial disposition is certainly incompatible with normal activities of the tribunal process.

CONCLUSION

The Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals should be denied.

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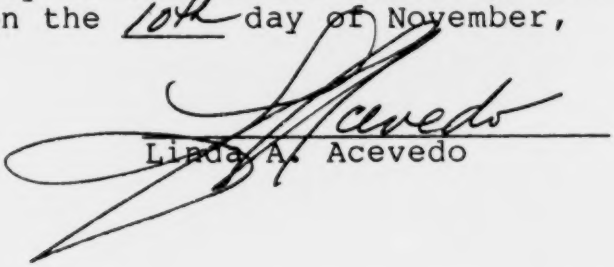
CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief for Respondent in Opposition to Certiorari has been served on Tom S. McCorkle, attorney of record for Petitioner, McCorkle & Westerberg, 500 Katy Building, Dallas, Texas 75202, by delivery of a true and correct copy to him by certified mail, return receipt requested, by depositing same, enclosed in a postpaid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 10th day of November, 1988.



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